

EU LAW IN MEMBER STATE COURTS: ‘ADEQUATE JUDICIAL PROTECTION’ AND EFFECTIVE APPLICATION – AMBIGUITIES AND NONSEQUITURS IN GUIDANCE BY THE COURT OF JUSTICE?

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Abstract EU law on judicial protection before Member State courts plays an essential role as to the practical significance of EU law. This article studies the so-called procedural autonomy case law of the Court of Justice of the EU by examining formulations of rulings, focusing on requirements for national remedial and procedural law and for national judgments. Judicial protection and related Member State obligations are manifold issues. In addition to the conundrum relating to the principle of, and right to, efficient judicial protection and their relationship to ‘Member State procedural autonomy’ principles of effectiveness and equivalence, nuances are visible in the conclusions of procedural autonomy reasoning itself. Aiming for effective application of EU law appears to lead to full effect-focused demands for national treatment so that interventions by the Court of Justice cannot be fully explained by the basic wording of the principles of effectiveness and equivalence. The requirement of ‘adequate judicial protection’, which at times seems to be a facet of the principle of effectiveness in particular but which may also ‘extend’ the twin principles, complexifies EU law on national enforcement. This study illustrates how the reasoning of the Court of Justice may contain varying meanings regardless of taking superficially similar basic requirements as starting points. Instances where more stringent demands on national systems are relevant, as well as the detailed effects, are difficult to discern. This results in lack of clarity as to how national courts should treat future cases and, for parties bringing claims, as to what kind of results to expect. The contribution ends with suggestions for clarifying EU law requirements.

Keywords Compensation; Damages liability; EU law; Full effectiveness of EU law; Individual liability; Judicial protection; Legal reasoning; Member State liability; National courts; Principle of effectiveness; Principle of equivalence; Procedural autonomy of Member States

I. INTRODUCTION

One of the most striking aspects of ‘EU procedural law’ is the role of Member State courts and national procedural and remedial rules. A vast amount of EU law¹ exists ‘on EU law in Member States’. Here, the focus is on the interaction of EU law with national remedial and procedural law, and on the EU requirements for decisions by national courts. The theme of judicial protection with a view to national remedies and procedures is of broad practical relevance, even though part of the discussion in this contribution focuses especially on the context of damages claims relating to different fields of EU law (such as competition, free movement and employment). The issues of remedies and procedure are intertwined and may actualise in horizontal relationships between individuals as well as in vertical relationships between individuals and Member States. Both ‘public’ and ‘private law’ matters with a EU law aspect may be instances where EU requirements for national enforcement systems are of relevance.

The so-called *procedural autonomy* case law and loyal or sincere cooperation-based principles of effectiveness and equivalence are often among the first mentioned when the discussion concerns relying on EU law or reacting to infringements of EU law in national courts. In addition to containing substantive and concrete rules, EU law, which needs to rely on national systems for enforcement, sets limits of acceptability for national law that intertwines with EU law. Case law by the Court of Justice of the EU (CJEU) on the express limits of acceptability, the twin principles of effectiveness and equivalence, has since the starting point in *Rewe*² developed into a massive bulk which both interprets the principles and, to some extent, encourages balancing them against other factors and legal concerns.

Other law on EU law infringements before national courts includes the general principle of effective judicial protection³ and the right to an effective remedy and to a

¹ The term ‘EU law’ is used in this text to refer to EU and Community law.

² Case 33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG* [1976] ECR 01989. The first version of the procedural autonomy *dictum*, in para. 5, reads: ‘Applying the principle of cooperation laid down in Article 5 of the [EEC] Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law. Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, – such conditions cannot be less favourable than those relating to similar actions of a domestic nature [principle of equivalence]. – [T]he right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules. The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect [principle of effectiveness, an early form].’ Notes in square brackets added by this author.

³ Originally referred to as a principle which underlies the constitutional traditions common to the Member States and which is laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In EU law, the judicial protection approach was already in the early stages coupled with the Member State obligation to contribute to the full effectiveness of EU law. See Case 222/84 *Johnston* [1986] ECR 01651, para. 18, 53.

fair trial in Article 47 of the Charter of Fundamental Rights of the European Union (CFR). The relationship between the twin principles (effectiveness and equivalence) and the right and principle of effective judicial protection may be described as blurry. A further aspect of the theme is the duty of Member States to offer sufficient judicial remedies (Article 19(1) Treaty on European Union, TEU).⁴ As regards the various legal bases relating to judicial protection, a rough description could be that they are all aspects of a whole which requires that appropriate judicial protection may be obtained and which requires national systems to ensure that relying on EU law may be effectively achieved in national courts so that sufficiently powerful reactions to EU law infringements are possible. Following this line of thought, details of the whole are also expressed by the requirements on sanctions for EU law infringements, the full effectiveness of EU law being an underpinning goal.⁵

The principle of effective judicial protection – and, post-Lisbon, increasingly also the corresponding right – seems to occupy an overarching role and to precede EU procedural autonomy law. However, the situation is anything but clear.⁶ Works by EU law scholars have discussed the relationship between the (*Rewe*) principle of effectiveness and the principle of effective judicial protection, or the corresponding right.⁷ Here, not all issues pertaining to the legal and theoretical structure of effective judicial protection in national courts may be examined at length. However, as a background to this research it should be noted that the principle of (and right to) effective judicial protection may be described as truly interested in judicial protection in a ‘*Rechtsstaat*’ way, whereas the principles of effectiveness and equivalence appear to be mainly motivated by effective application of EU law.⁸

⁴ See also, as to different effective judicial protection elements and their combination, for instance, Case C-432/05 *Unibet* [2007] ECR I-02271, para. 36–44 and 54; Case C-327/02 *Panayotova* [2004] ECR I-11055, para. 26–28, 39; Opinion of Advocate General Jääskinen in Case C-536/11 *Donau Chemie* [2013], electronic reports, in particular, para. 45, 51–53.

⁵ Sanctions must be ‘effective, proportionate and dissuasive’ See, for example, C-186/98 *Nunes and de Matos* [1999] ECR I-04883, para. 9–10. See also Case 14/83 *Von Colson* [1984] ECR 01891, operative part. Requirements as to sanctions are also based on the principle and the Article on sincere cooperation. See also, for instance, M. Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press, Oxford 2014), p. 129.

⁶ In addition to the case law in note 4, see, for example, Case C-268/06 *Impact* [2008], ECR I-02483, para. 40–55; Case C-409/06 *Winner Wetten* [2010] I-08015, para. 53–58 (emphasising supremacy and full effectiveness of EU law). On the ambiguous relationships between different judicial protection elements, see P. Van Cleynenbreugel, ‘*The Confusing Constitutional Status of Positive Procedural Obligations in EU Law, Observations on effective judicial protection and national procedural autonomy in the wake of Boxus*’, 5 *Review of European Administrative Law (REALaw)* 1, p. 81–100, in particular p. 81–82, 88–100 (2012). See also S. Prechal and R. Widdershoven, ‘*Redefining the Relationship between “Rewe-effectiveness” and Effective Judicial Protection*’, 4 *REALaw* 2, p. 31–50 (2011). In addition, see J. Engström, ‘*The Principle of Effective Judicial Protection after the Lisbon Treaty – reflection in the light of Case C-279/09 DEB*’ 4 *REALaw* 2, p. 53–68 (2011); A. Arnulf, ‘*The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?*’ 36 *European Law Review* 1, p. 51–70 (2011).

⁷ S. Prechal and R. Widdershoven, 4 *REALaw* 2 (2011); P. Van Cleynenbreugel, 5 *REALaw* 1, p. 88–100 (2012). Note also, for example, R. Barents, ‘*EU Procedural Law and Effective Legal Protection*’, 51 *Common Market Law Review (CMLR)*, p. 1437–1462, at 1437–1438 and 1454–1456 (2014).

⁸ See, in particular, S. Prechal and R. Widdershoven, 4 *REALaw* 2, p. 39–50 with references (2011).

In this article, the aim is a closer look at the nuances and effects of procedural autonomy reasoning⁹. Through close examination of CJEU case law on relying on EU law and the duties of national systems in that context, this contribution seeks to illustrate how different standards and goals may lie behind the rather monotonous language of the CJEU, so that evaluating the correct treatment of a pending claim before a national court may be close to guesswork. Research of this nature is a step towards a better understanding of how EU law related claims should (or will) be treated by national courts. This contribution mostly assesses the issue of what should be noted when analysing the relevant EU law. This article also seeks to contribute to revealing points where a risk exists that national courts do not know, or may misunderstand, what EU law requires – or where the expectations of the parties may be misled because of the language used by the CJEU in its earlier guidance. Furthermore, suggestions are presented for developing CJEU guidance – even though it is also evident that vagueness of reasoning allows re-directing law in new preliminary rulings more easily than is the case with the detailed, somewhat inflexible explanations in earlier judgments.

This article emphasises that there is more to *effective application of EU law*-oriented procedural autonomy law than the core contents of the principles of effectiveness and equivalence – that there seems to be a more ambiguous element that may accompany the twin principles, and that this element is prone to create confusion. A requirement of ‘adequate judicial protection’ or a similar phenomenon, which is a matter of the same context as the twin principles but may exceed the minimum requirements set by them, has already previously been noted by legal scholars.¹⁰ The requirement of ‘adequate judicial protection’, as it is called also in this contribution, even though the name is rough and partially misleading (hence the quotation marks), appears to be purpose-oriented and used by the CJEU in reasoning that emphasizes the *full effectiveness*¹¹ of EU law.¹² Several commentators have pointed out that the CJEU seems at times to interfere in matters of national remedies and procedures more willingly or strongly where core issues of the Internal Market are involved¹³ or when

⁹ That is, the use and implications of the procedural autonomy *dictum* (or ‘*Rewe mantra*’, see, for example, S. Prechal and R. Widdershoven, 4 REALaw 2, p. 31 (2011),) or parts of it.

¹⁰ See, in particular, W. Van Gerven, ‘Of Rights, Remedies and Procedures’, 37 CMLR 3, p. 501–536, for instance, 503–504, 511–512, 528 (2000). See also G. Cumming et al., *Civil Procedure Used for Enforcement of EC Competition Law by the English, French and German Civil Courts*, p. 280 (Alphen aan den Rijn: Kluwer 2007). See also S. Prechal and R. Widdershoven, 4 REALaw 2, p. 49–50, 39 (the authors note that effective application-driven ‘*Rewe-effectiveness*’ could develop into an additional and more stringent standard) (2011); P. Van Cleynenbreugel, ‘Transforming Shields into Swords: The VEBIC Judgment, Adequate Judicial Protection Standards and the Emergence of Procedural Heteronomy in EU Law’, 18 Maastricht Journal of European and Comparative Law (MJ) 4, p. 511–547 (2011).

¹¹ Or full effect, *effet utile*.

¹² See also Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-01029, para. 82. Van Gerven refers to the case as an adequate judicial protection case: W. Van Gerven, 37 CMLR 3, p. 511–512, 528 (2000).

¹³ Remarks include suggesting links between the nature of law as requiring uniformity across the Union, (systematic) EU harmonisation and the CJEU intervention. See, in particular, M. Dougan, *National Remedies Before the Court of Justice, Issues of Harmonisation and Differentiation* (Oxford

the case deals with EU law essential from the perspective of Union goals.¹⁴ These remarks may be considered in parallel with recognition of the ‘adequate judicial protection’ element.

Prima facie, it is challenging to try to point out when exactly the strong requirement of ‘adequate judicial protection’ would be relevant. It is not coherently referred to either in CJEU case law or by commentators¹⁵ but its connection to the principle of sincere co-operation (currently Article 4(3) TEU, previously 10 EC, 5 EEC), which underlines Member State duties in contributing to achieving Union goals, appears to be strong.¹⁶ The requirement may be highly teleological and even signify that of the possible ways of treating an EU law-based claim, the way which *most contributes* to *achieving the goals of the EU* should be selected. This means that even though the requirement is connected to the principle of effective judicial protection and Article 47 of the CFR, it is not necessarily exhausted by their ‘approach’.¹⁷

It is here that the paradoxical nature of the (name of the) requirement may also be stressed. The focus is not entirely on the individual who brings a claim to a national court but on the effect that EU law may gain through that claim or the possibility of that claim. To some extent, the paradoxical nature matches the history of Union or Community rights of individuals.¹⁸

and Portland: Hart Publishing, 2004), p. 67–68, 83–84, 120–152, 356–359, 386–387. See also A. Adinolfi, ‘The “Procedural Autonomy” of Member States and the Constraints Stemming from the ECJ’s Case Law: is Judicial Activism Still Necessary?’, in H.-W. Micklitz and B. de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, p. 281–303, at 299–301 (Cambridge – Antwerp – Portland: Intersentia, 2012).

¹⁴ See, for instance, P. Craig and G. de Búrca, *EU Law Text, Cases and Materials*, p. 222–223, 230–231 (Fifth edition, Oxford: Oxford University Press, 2011), and the fourth edition of the same volume, p. 320 (Oxford: Oxford University Press, 2008); D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the ‘Functionalized Procedural Competence’ of EU Member States*, p. 19–21 (Corrected printing, Heidelberg – Dordrecht – London – New York: Springer, 2011). See also S. Prechal, *Directives in EC Law*, p. 173–175 (Second Edition, Oxford: Oxford University Press, 2005). See further K. Havu, *Oikeus kilpailuoikeudelliseen vahingonkorvaukseen EU:n ja Suomen oikeudessa*, p. 252–257 (Helsinki: Suomalainen Lakimiesyhdistys, 2013). See also on legislative and other developments regarding collective redress S. Voet, ‘European Collective Redress: A Status Quaestionis’, 4 *International Journal of Procedural Law* 1, p. 97–128 (2014).

¹⁵ As to the difficulty of recognizing the requirement in case law, see W. Van Gerven, 37 *CMLR* 3, p. 528–531 (2000). See also S. Prechal and R. Widdershoven, 4 *REALaw* 2, p. 49 and 39 (2011); M. Bobek, ‘Why There is no Principle of ‘Procedural Autonomy’ of the Member States’, in H.-W. Micklitz and B. de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, p. 305–323 (Cambridge – Antwerp – Portland: Intersentia, 2012).

¹⁶ See also, for example, Case 14/83 *Von Colson* (para. 26–28), and Case C-271/91 *Marshall II* [1993], ECR I-04367, which W. Van Gerven (37 *CMLR* 3 (2000)) recognizes as adequate judicial protection cases. See also Sections III.A–III.C below.

¹⁷ See also S. Prechal and R. Widdershoven, 4 *REALaw* 2, p. 39–50 (2011), who note the differing goals of different judicial protection elements of EU law and discuss the possibility that the (*Rewe*) principle of effectiveness may develop further in order to guarantee effective application of EU law. Note also R. Barents, 51 *CMLR*, p. 1456 (2014); K. Havu, ‘Private Enforcement of EU (Competition) Law – Remarks and Outlooks Regarding the Intertwinement of EU and National Law’, 150 *Tidskrift utgiven av Juridiska Föreningen i Finland (JFT)* 1–2, p. 55–72, 58–60 (2014).

¹⁸ Extensive review is not possible here, but see Case 26/62 *Van Gend en Loos* [1963] ECR 00003 (noting that ‘the vigilance of individuals concerned to protect their rights amounts to an effective

Next, starting points for analysing nuances of procedural autonomy reasoning, growing demands for national systems and ‘adequate judicial protection’ element are presented (Section II). After this, CJEU case law of potential particular interest is studied with the aim of observing what exactly is required as to treatment of EU law based claims, with what rationale, and how this is expressed. Even though a brief review of pointillist case law has its limits as regards deductions, a series of remarks is presented on the use of the principles of effectiveness and equivalence, ‘adequate judicial protection’ element and exceeding the ‘minimum content’ of the twin principles, especially when it comes to compensation for infringements of EU law (Section III).

II. STARTING POINTS FOR ANALYSIS

The ‘adequate judicial protection’ requirement may be described as a facet, an expression or element of the procedural autonomy principles, especially of effectiveness. However, it may potentially set requirements additional to those set by the core contents of the principles of effectiveness and equivalence. The strong requirement is apparently blurry.

In his work, Van Gerven connected the requirement of ‘adequate judicial protection’ to *remedies* (before a national court) and, in particular, to sufficiency and extent of redress. This is worth mentioning even though the borders between rights, remedies and procedural rules are intricate issues.¹⁹

Difficulties as to studying the ‘adequate judicial protection’ requirement relate to the fact that the CJEU does not necessarily expressly mention or discuss the sub-parts of procedural autonomy requirements and their relationship to other aspects of EU law in national systems. It is conceivable that the relevance and implications of the ‘adequate judicial protection’ requirement in new cases are ambiguous. National courts must, in addition to other issues that relate to recognizing and applying relevant EU law, tackle the absence of clarity as to applicable limits of acceptability of national law. Hence, it is possible that a ‘too little EU law-favourable’ decision is adopted if the national court only recognizes the relevance of the principles of effectiveness and equivalence *and their core contents* (stating that it is not acceptable

supervision’), and, for example, T. Eilmansberger, ‘*The Relationship between Rights and Remedies in EC Law: in Search of the Missing Link*’, 41 CMLR 5, p. 1199–1246 (2004); M. Ruffert, ‘*Rights and Remedies in European Community Law: A Comparative View*’, 34 CMLR 2, p. 307–336 (1997). See also S. El Boudouhi, ‘*The National Judge as an Ordinary Judge of International Law? Invocability of Treaty Law in National Courts*’, 28 Leiden Journal of International Law, p. 283–301, at 283–287 (2015).

¹⁹ See further W. Van Gerven, 37 CMLR 3, for instance, p. 503–504, 506–521, 526–528 (2000), and, in particular, T. Eilmansberger, 41 CMLR 5 (2004). See also K. Havu 150 JFT 1–2, p. 57–63 (2014); K. Havu, *Oikeus kilpailuoikeudelliseen vahingonkorvaukseen EU:n ja Suomen oikeudessa*, p. 223–305. On adequate judicial protection and procedural matters, see P. Van Cleynenbreugel, 18 MJ 4 (2011).

to render relying on EU law or rights practically impossible or excessively difficult or to treat an EU law-based claim less favourably than a similar claim based on domestic law).²⁰

One could argue that, if in doubt, national courts should choose a more EU law-favourable approach over a less EU law-favourable approach, but this is also by no means unproblematic. The principles concerning the effects of EU law in Member States are powerful tools capable of resulting in special interpretations of national provisions, disapplying (setting aside) components of national law and rendering ‘novel’ EU law(-compatible) rules applicable to a case before a national court. These effects should not be realized without a basis in law. However, if the national court’s understanding of the EU law requirements exceeds the ‘correctly interpreted EU law requirements’ the result may be a decision that is not completely based on law.²¹

III. REQUIREMENT FOR ‘ADEQUATE JUDICIAL PROTECTION’ IN EU CASE LAW

A. PRELIMINARY REMARKS

Cases that could demonstrate the existence and nature of the ‘adequate judicial protection’ requirement are now explored. One of the logical starting points for highlights are the cases mentioned by Van Gerven when formulating the requirement, as well as cases referred to by scholars who point to connections between essential (Internal Market or economic) EU law, requirements for judicial protection, and the CJEU’s willingness to intervene in matters of national remedies and procedure.²² Space does not allow an extensive review of case law. The focus is intended to be on the most striking aspects of procedural autonomy-type reasoning.

In order to discuss the nuances of the procedural autonomy reasoning, it is crucial to analyse the ‘adequate judicial protection’ requirement in relation to the explicit

²⁰ See also K. Havu 150 JFT 1–2, p. 58–63 (2014). On issues of recognizing and complying with relevant EU law, see also, for example, B. Krans, ‘EU Law and National Civil Procedure Law: An Invisible Pillar’, 23 European Review of Private Law 4, p. 567–588, 567–572, 581–587 (2015).

²¹ In order to illustrate the conundrum of how much EU law requires: A Finnish district court had to decide on damages liability succession in the context of an asphalt cartel that had infringed both EU and domestic competition law. The Court pointed out that under Finnish law, liability for damages relating to competition law infringements would not transfer to a company which acquires an undertaking that is guilty of breaching competition law. The Court found this problematic from the point of view of ‘the system of legal consequences of EU competition law infringements’ and reasoned, referring to, i. a., EU case law on liability for competition law fines, that it was necessary to find that *private* liability had transferred to companies that had acquired business activities in the context of which competition infringements had taken place. The mere principle of effectiveness does not clearly require this conclusion, nor does an applicable, exact rule of EU law exist. It is questionable whether EU and national law are combined correctly in situations like these. See Helsinki District Court, judgment 28.11.2013, L 09/49467, and K. Havu 150 JFT 1–2, p. 66–72 (2014).

²² See Introduction and notes 13 and 14 above.

procedural autonomy principles. It is evident that the idea behind the original recognition of the ‘adequate judicial protection’ requirement must have been that the case law of the CJEU contains interventions in issues of national remedies (and procedure) that may not be explained solely by relying on the the minimalistic basic forms of the principles of effectiveness and equivalence even though the interventions would take place ‘within procedural autonomy reasoning’²³. Nowadays, the CJEU in its judgments uses procedural autonomy *dicta* that often include both a description of the main contents of the principles of effectiveness and equivalence and their names:

it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar national actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).²⁴

Of course, interpretation of the twin principles and their detailed significance in all kinds of specific circumstances has been the subject of numerous preliminary rulings.²⁵ But what is meant by the principles in the procedural autonomy *dicta*, and what the core significance or core content of the twin principles should be regarded to be, is reasonably clear.

The principle of effectiveness (national rules must not render relying on EU law practically impossible or excessively difficult) developed into its current formulation from the prohibition against ‘practical’²⁶ impossibility’.²⁷ In particular, the ‘excessively difficult’ (in French ‘*excessivement difficile*’) part of the core contents of the principle could be seen as such a limit of acceptability the significance of which

²³ But as to explicit reliance by the CJEU on procedural autonomy argumentation being potentially misleading, see P. Van Cleynenbreugel, 5 REALaw 1, p. 90–93 (2012).

²⁴ Joined Cases C-89/10 and C-96/10 *Q-Beef and others* [2011] ECR I-07819, para. 32. See also, for instance, Case C-268/06 *Impact*, para. 46; Case C-432/05 *Unibet*, para. 43.

²⁵ See further, for instance, T. Tridimas, *The General Principles of EU Law*, p. 418–476 (Second edition, Oxford: Oxford University Press, 2006); M. Dougan, *National Remedies Before the Court of Justice*, p. 24–38.

²⁶ Or ‘virtual’, see for example Case 199/82 *San Giorgio* [1983] ECR 03595.

²⁷ See, for instance, Case 68/79 *Just* [1980] ECR 00501, para. 18, which still mentions mere practical impossibility. Compare to Case 199/82 *San Giorgio*, para. 12–14. Para. 12 also includes references to earlier case law which only mentions practical impossibility. See similarly K. Havu, *Oikeus kilpailuoikeudelliseen vahingonkorvaukseen EU:n ja Suomen oikeudessa*, p. 257–258. See also M. Bobek, in H.-W. Micklitz and B. de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, p. 306; P. Craig – G. de Búrca, *EU Law Text, Cases and Materials*, p. 219 (2011); A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, p. 87–101 (Second edition, Oxford: Oxford University Press, 2007).

could vary slightly depending on the circumstances of the case. One might also consider whether some language versions suggest this more than others.²⁸

Nevertheless, the current long formulation of the core contents of the principle of effectiveness somewhat clearly refers to the *impossibility or considerable difficulty* of effectively relying on EU law. This and procedural autonomy case law more generally give rise to three rough remarks: Firstly, not everything that comes in addition to the prohibition of *practical impossibility* is outside of the (core) meaning of the principle of effectiveness. Secondly, however, it appears that some of the known conclusions drawn from the principle of effectiveness in the case law of the CJEU may not be necessitated by the principle, at least if one interprets its core contents narrowly.²⁹ Thirdly, description of ‘adequate judicial protection’ requirement as an element or expression of, in particular, principle of effectiveness may be supported by the fact that it seems like there is no clear ‘border’ between different levels of requirements or that the requirements, to an extent, overlap.³⁰ The ‘adequate judicial protection’ requirement may, nevertheless, sometimes be observed as significantly ‘extended application’ of, for instance, the principle of effectiveness. This is discussed further in Sections III.D–III.F.

As to the principle of equivalence, its core contents refer to a prohibition against less favourable treatment of an EU law-based claim when compared to similar claims made on the basis of national law. The CJEU has given guidance on the application of the principle stating that national courts have to ‘consider both the purpose and the essential characteristics of allegedly similar domestic actions’.³¹ Notably, the core content of the principle of equivalence has not been understood as suggesting that when compared to several national options that can all be regarded as similar, only the *most favourable* of these would be acceptable as a way to treat an EU law-based

²⁸ English, French and Spanish (*‘excesivamente difícil’*) or German (*‘übermäßig erschwert’*) perhaps do not suggest this indisputably whereas, for instance, the (less important) Swedish (*‘orimligt svårt’*) and Finnish (*‘suhteettoman vaikeaksi’*) may hint at a more relative approach. See, for example, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, para. 67. The authentic languages of the joined cases are English and German.

²⁹ Examples of the case law are discussed in the following Sections. As to literature, for example M. Dougan, *National Remedies Before the Court of Justice*, p. 258, notes: ‘the Court has sent out confusing signals about what the principle of effectiveness requires as regards the level of compensation which must be guaranteed under national law’. See also J. Temple Lang, *‘Developments, Issues, and New Remedies – The Duties of National Authorities and Courts Under Article 10 of the EC Treaty’*, 27 *Fordham International Law Journal*, p. 1904–1939, at 1908–1910 and 1938 (2003–2004). The author highlights the in practice comprehensive nature of the principles of effectiveness and equivalence. See also M. Bobek, in H.-W. Micklitz and B. de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, p. 307, 311–312, 316–318, 322–323.

³⁰ See also P. Van Cleynenbreugel, 18 *MJ* 4, p. 538 (2011); P. Craig and G. de Búrca, *EU Law Text, Cases and Materials*, p. 218–219 and 220–227 (2011). Note that also W. Van Gerven, 37 *CMLR* 3 (2000), in particular, p. 503–504, 527–528, considers that ‘adequate judicial protection’ exceeds the twin principles when the principle of effectiveness is understood according to the longer formulation, but does not structure the relationships between the twin principles and adequate judicial protection in detail.

³¹ For example, Case C-78/98 *Preston* [2000] ECR I-03201, para. 49, 55–61.

claim³² or that an EU law-based claim should be treated *better* than claims based on domestic law. The ‘adequate judicial protection’ element and stronger demands related to it could, however, produce results like these.

One could ask, more generally, whether the recurring formulation of the procedural autonomy *dictum* precludes the possibility of requirements exceeding the (core contents of) effectiveness and equivalence. However, this is not the case as the *dictum* does not suggest it would be exhaustive as to requirements for national systems.³³ Moreover, as will be discussed in the following Sections, extension of the principles of effectiveness and equivalence as a form of increasing the requirements for national systems results, at points, in the *prima facie* nonexistence of extra requirements.

To some extent the twin principles, the element of ‘adequate judicial protection’ and the *right to and the principle of effective judicial protection*, require the same and similar things from national systems. One interpretation of the situation could be that the general right to effective judicial protection is (partially) made more specific, for instance, by the principle of effectiveness and its different aspects. Further specifications may shed light on the balance of EU law interests behind the requirements for national enforcement. In the case law, however, different procedural and remedial matters may present themselves as very much intertwined.³⁴

B. FIRST SIGNS OF ‘ADEQUATE JUDICIAL PROTECTION’?

In *Von Colson*³⁵, *Marshall II*³⁶ and *Brasserie du Pêcheur*³⁷ the CJEU explicitly referred to adequacy or commensurability of compensation for damages caused by a breach of EU law. Van Gerven, who based recognition of the ‘adequate judicial protection’ requirement on these cases, highlights *Von Colson* paragraph 28, in which the Court articulates that compensation must be ‘adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation’.³⁸ Van Gerven points out that in *Marshall II* the CJEU required the ‘measure’ to be ‘adequate’ and that it ‘must enable the loss and damage actually sustained – – to be

³² For example, Case C-326/96 *Levez* [1998] ECR I-07835, para 42.

³³ See the quote above in this Section and note 24. See also on the secondary nature of the principles of effectiveness and equivalence (relating to the precondition of ‘in the absence of EU law on the matter’) P. Van Cleynenbreugel, 5 REALaw 1, p. 91–100 (2012).

³⁴ See also remarks and references on this matter in the Introduction.

³⁵ Case 14/83 *Von Colson*. See also W. Van Gerven, 37 CMLR 3, p. 528–531 (2000).

³⁶ Case C-271/91 *Marshall II* [1993] ECR I-04367. See also W. Van Gerven, 37 CMLR 3, p. 528–531 (2000).

³⁷ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*. See also W. Van Gerven, 37 CMLR 3, p. 528–531 (2000).

³⁸ Case 14/83 *Von Colson*, para. 28 (in the authentic language of the case, German, the relevant part reads: ‘in einem angemessenen Verhältnis zu dem erlittenen Schaden stehen und somit über einen rein symbolischen Schadensersatz wie etwa die bloße Erstattung der Bewerbungskosten hinausgehen’); W. Van Gerven, 37 CMLR 3, see, in particular, p. 528 (2000). See also p. 530.

made good in full'.³⁹ As to *Brasserie du Pêcheur*, Van Gerven emphasises paragraph 82, where the CJEU states, in addition to mentioning the core contents of the principles of effectiveness and equivalence (paragraphs 67–83): 'Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights.'⁴⁰

Van Gerven also makes the general remark that the requirement of 'adequate judicial protection' is visible in some cases that deal with damages claims but that the case law appears to be incoherent and, for instance, restitution cases seem to turn on the mere (core contents of) principles of effectiveness and equivalence instead of a higher standard.⁴¹ Nevertheless, Van Gerven considers wider adoption of the 'adequacy test' justified, hinting that a test turning on 'practical' or 'virtual impossibility' and 'excessive difficulty' is a perverse starting point from the perspective of enforcement of Community rights. A more reasonable way to look at the issue would be to ask whether enforcement is sufficient or powerful enough.⁴²

On the basis of the damages cases above, it is likely that the requirement of 'adequate judicial protection' is partially truly inspired by the aim of sufficiently protecting the interests of individuals in cases of breaches of EU law. However, judgments also contain reasoning that emphasises the need to secure the full effectiveness of EU law. For instance, in *Brasserie du Pêcheur*, full effectiveness of Community law is mentioned several times and the duty of Member States to cooperate (principle of sincere cooperation, then Article 5 EEC) is also referred to.⁴³ Moreover, the judgments in *Von Colson* and *Marshall II* refer to the other than compensatory, that is, deterrent, goals of damages liability.⁴⁴ Van Gerven notes this – and the odd way of seeing damages in these cases as well as in the case of *Dekker*⁴⁵ – but the significance of the full effectiveness-oriented reasoning may be emphasised as an addition to his analysis.⁴⁶

It is noteworthy that requirements that exceed those set by the principles of effectiveness and equivalence partially take place in cases where the CJEU mixes

³⁹ Case C-271/91 *Marshall II*, para. 26 (the authentic language of the case is English); W. Van Gerven, 37 CMLR 3, in particular p. 528 (2000). See also p. 530.

⁴⁰ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, para. 82; W. Van Gerven, 37 CMLR 3, p. 528, 530 (2000).

⁴¹ *Ibid.*, p. 528–531.

⁴² *Ibid.*, see p. 531–535. See also S. Prechal and R. Widdershoven, 4 REALaw 2, p. 38–41 (2011). The authors discuss the 'mildness' of the original *Rewe* test. Note, furthermore, F. Della Negra, 'The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová', 52 CMLR, p. 1009–1032, at 1020–1024 (2015).

⁴³ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, see, in particular, para. 20, 39, 72 and para. 4 of the summary.

⁴⁴ See Case 14/83 *Von Colson*, para. 28; Case C-271/91 *Marshall II*, para. 23–24, 26.

⁴⁵ Case C-177/88 *Dekker* [1990] ECR I-03941, see para. 23 and 26.

⁴⁶ See W. Van Gerven, 37 CMLR 3, p. 530–535 (2000).

reasoning on sanctions and compensation for EU law infringements.⁴⁷ This evidences the centrality of the *full effectiveness of EU law* in the reasoning and suggests that the ways of achieving full effect are not of primary importance. Hence, the ‘adequate judicial protection’ element appears to contain a remarkable component which is firmly tied to the principle of sincere cooperation⁴⁸ and the duties it imposes on Member States.⁴⁹ The centrality of full effect is illustrated further by, for example, *Courage* case law and phenomena similar to it – an issue that is discussed more elaborately in the next Section (III.C).

C. CENTRAL FIELDS OF EU ECONOMIC AND INTERNAL MARKET LAW AND EXCEEDING THE CORE CONTENTS OF THE PRINCIPLES OF EFFECTIVENESS AND EQUIVALENCE?

Among other *economic integration-centred* EU judgments, *Courage* case law has been pointed out as a line of judgments that shows powerful interventions by the CJEU in remedial and procedural matters.⁵⁰ The relevant cases have included statements noting that the infringed competition Article (now 101(1) Treaty on the Functioning of the European Union, TFEU) is ‘a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the Internal Market’⁵¹ and also that, for instance, full effectiveness and the practical effect of the relevant substantive rule would be put at risk if it were not open to any individual to claim compensation.⁵² Even though the procedural autonomy *dictum* is in frequent use, a *damages claim* should be a remedy available for all willing claimants (apparently regardless of, for instance, the

⁴⁷ See Case 14/83 *Von Colson*, para. 21–28; Case C-271/91 *Marshall II*, para. 23–24, 26.

⁴⁸ See Case 14/83 *Von Colson*, in particular, para. 26–28; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, in particular, para. 39, 72 and para. 4 of the summary. See also Case C-271/91 *Marshall II*, para. 22–24, which, without explicit reference to loyal or sincere cooperation, employ similar language and refer to the judgment in *Von Colson*. As J. Temple Lang, 27 *Fordham International Law Journal*, p. 1905 (2003–2004), remarks, the principle of sincere cooperation may also be reflected in cases which lack particular references to it. See also Case C-177/88 *Dekker*, para. 23–26, which seem slightly ‘farther’ from sincere cooperation even though, for instance, the *Von Colson* judgment is referred to again. *Dekker* does not mention adequacy or commensurability as regards the relationship between compensation and harm but states that ‘any infringement – suffices in itself to make the person guilty of it fully liable, and no regard may be had to the grounds of exemption envisaged by national law’ (para. 26).

⁴⁹ See also K. Havu, *Oikeus kilpailuoikeudelliseen vahingonkorvaukseen EU:n ja Suomen oikeudessa*, p. 254.

⁵⁰ Case C-453/99 *Courage* [2001] ECR I-06297 being the key judgment. As to the literature, see, for instance, P. Craig and G. de Búrca, *EU Law Text, Cases and Materials*, p. 222–231 (2011); M. Dougan, ‘The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Second edition, Oxford: Oxford University Press, 2011) p. 407–438, at 426–435. See also K. Havu, ‘Horizontal Liability for Damages in EU Law – The Changing Relationship of EU and National Law’, 18 *European Law Journal* (ELJ) 3, p. 407–426, at 413–426 (2012).

⁵¹ Case C-453/99 *Courage*, para. 20.

⁵² See Case C-453/99 *Courage*, para. 23–27; Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-06619, for example, para. 60–61, see also para. 95–100; Case C-199/11 *Otis* [2012] electronic reports of cases, para. 40–43.

possibility of restitution or returning the contract price), and *the scope of liability is extensive* as even sufferers of very indirect harm are not, at least as a starting point, excluded, while loss of profit (*lucrum cessans*) as well as interest are explicitly included as types of damages.⁵³

Even before *Courage*, the CJEU had made similar remarks on the nature of the prohibition against competition-infringing contracts and, for instance, noted in *Eco Swiss* that the prohibition should be regarded as parallel to national public policy rules in the context of annulment of arbitration awards⁵⁴ and then evaluated a related time-limit issue as a procedural autonomy question.⁵⁵ The fair competition case *Muñoz* shows full effectiveness-related similarities to *Courage* which should be noted even though *Muñoz* does not really contain procedural autonomy reasoning. However, the finding that an EU law rule must be enforceable in civil proceedings between private parties is most of all tied to the practical effect of the relevant substantive law, not, for instance, to the principle of effective judicial protection.⁵⁶ The Advocate General's Opinion in *Muñoz* draws explicit parallels with *Courage*.⁵⁷

Effective application of competition provisions is very explicitly connected to the procedural autonomy *dictum* in *Donau Chemie*, by adding after the usual formula that '(s)pecifically, in the area of competition law, those rules must not jeopardise the effective application of Articles 101 TFEU and 102 TFEU'. The CJEU made strong statements on the unacceptability of a national rule, underlining the principle of effectiveness.⁵⁸ Of other competition-related cases on national systems' duty to ensure

⁵³ See Case C-453/99 *Courage*, para. 26–27; Joined Cases C-295/04 to C-298/04 *Manfredi*, para. 95–100. In *Courage*, the procedural autonomy formula or parts of it are seen, for instance, in para. 29, in *Manfredi*, for instance, in para. 95, 100. In detail on the restrictions of procedural autonomy in *Courage* and *Manfredi*: K. Havu, 18 ELJ 3, p. 416–420 (2012). As regards the scope of liability, further proof of its significance, as well as of the exceptional nature when compared to treatment of many situations of pure economic loss, is Case C-557/12 *Kone* (not yet reported), where the issue is essentially whether the liability of competition infringers towards so-called umbrella customers (customers of infringers' competitors) should be possible. See also N. Dunne, 'It never rains but it pours? Liability for "umbrella effects" under EU competition law in *Kone*', 51 CMLR 6, p. 1813–1828 (2014).

⁵⁴ Case C-126/97 *Eco Swiss* [1999] ECR I-03055, see para. 36–41.

⁵⁵ Case C-126/97 *Eco Swiss*, see para. 43–48. See also P. Craig and G. de Búrca, *EU Law Text, Cases and Materials*, p. 230–231 (2011), and p. 318 and 320 (2008); M. Dougan, *National Remedies Before the Court of Justice*, p. 48–49, 368–373.

⁵⁶ See Case C-253/00 *Muñoz* [2002] ECR I-07289, para. 27–32. As regards comments, see, for instance, T. Eilmansberger, 41 CMLR 5, p. 1226–1228 (2004).

⁵⁷ See Opinion of Advocate General Geelhoed, in particular, para. 59–60, 3 and 53.

⁵⁸ See Case C-536/11 *Donau Chemie*, para. 27 (with references to Case C-360/09 *Pfleiderer* [2011] ECR I-05161 and Case C-439/08 *VEBIC* [2010] ECR I-12471). In later paragraphs, the CJEU noted that 'in so far as the national legal measure or rule – – allows the parties to the main proceedings having infringed Article 101 TFEU the possibility of preventing persons allegedly adversely affected by the infringement – – from having access to the documents in question, without taking account of the fact that that access may be the only opportunity those persons have to obtain the evidence needed – –, that rule is liable to make the exercise of the right to compensation – – excessively difficult' (para. 39). The CJEU concluded that 'European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made

EU rules take full effect, for instance, in *CIF*, the principle of sincere cooperation read together with substantive competition law led the CJEU to rule that a national competition authority was under the obligation to disapply national law which undermined EU competition law.⁵⁹ However, *CIF* or similar cases on national law in contradiction with Member State duties and securing full effectiveness do not seem to employ procedural autonomy language.⁶⁰

In some other competition law public enforcement cases the procedural autonomy *dictum* or parts of it do appear. In *VEBIC*, the Court also explicitly referred to procedural autonomy, and mentioned effectiveness of EU competition law several times, while it ruled, narrowing the area of autonomy, that national competition authorities must be able to participate as a party in judicial proceedings that concern their own decisions.⁶¹ The case has been regarded as signifying remarkable intervention in procedural autonomy.⁶²

On the other hand, in *Schenker*⁶³, which concerned *bona fide* as to complying with competition law and decisions that national competition authorities may take in case of negligent infringement of EU competition law, there is no clear procedural autonomy reasoning. However, the effectiveness of EU competition law is discussed again and the Court presents specific analysis on possible decisions by national authorities as well as on the exceptional nature of a decision finding competition law infringement but not imposing a fine.⁶⁴ Both *VEBIC* and *Schenker* are Grand Chamber judgments and turn on interpretation of specific rules on competition law enforcement, such as Regulation 1/2003.⁶⁵ One can ask whether directing the guidance to national competition authorities in *CIF* and *Schenker* explains the absence of classic procedural autonomy language.⁶⁶

Uniplex concerned limitation periods and EU secondary law relating to public procurement. The CJEU emphasised ‘applying Community law fully’, set specific requirements as to the beginning of the time to initiate proceedings and noted that a

available under a leniency programme, by third parties – – is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved’ (para. 49).

⁵⁹ Case C-198/01 *Consortio Industrie Fiammiferi (CIF)* [2003] I-08055, see para. 46–52. As to comments, see J. Temple Lang, 27 *Fordham International Law Journal*, p. 1927–1928 (2003–2004).

⁶⁰ See also, for example, Case 229/83 *Leclerc* [1985] ECR 00001.

⁶¹ Case C-439/08 *VEBIC*, see, in particular, para. 58, 64 and the operative part.

⁶² See, for example, F. Rizzuto, ‘The procedural implications of *VEBIC*’, 32 *European Competition Law Review* 6, p. 285–296 (2011). In detail on *VEBIC* and for related discussion on requirements for judicial protection, see also P. Van Cleynenbreugel, 18 *MJ* 4, in particular, p. 521, 528–547 (2011).

⁶³ Case C-681/11 *Schenker* [2013], electronic reports.

⁶⁴ *Ibid.*, see para. 36–50.

⁶⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1, 1.

⁶⁶ See also, however, Opinion of Advocate General Kokott in Case C-681/11 *Schenker*, para. 113–114, underlining the principle of effectiveness in the context of public enforcement of competition law. Achieving the goals of competition law seems more central than specific ways of requiring a contribution to doing so.

national court must also otherwise take into account that national law that is incompatible with relevant secondary law and does not lend itself to an interpretation which accords with EU law should be disappplied.⁶⁷ The CJEU mentions the principle of effectiveness and its core contents but the role of the principle in the CJEU's conclusions is not clear. The reasoning includes detailed comments on the unacceptability of a national rule.⁶⁸

As to free movement and related law, it should be noted that *Brasserie du Pêcheur*, which was discussed in Section III.B above (and will be discussed in Section III.D below), also related to free movement of goods.⁶⁹ In *Panayotova*, the right of establishment and its restrictions in the form of rejections of residence permits were discussed. The CJEU found making the grant of a residence permit subject to specific conditions to be compatible with EU law but commented that treatment of residence permit issues must be *based on a procedural system* which is 'easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time, and refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings'.⁷⁰ One can ask, for instance, whether 'easily accessible' equals 'not practically impossible or excessively difficult' or does it exceed the requirements set by the traditional principle of effectiveness. The principle of effective judicial protection plays a role in the reasoning but the CJEU seems to derive 'easily accessible' directly from procedural autonomy principles.⁷¹

The highlighted cases of *central economic law* indeed include procedural autonomy reasoning with *interventionist requirements* or conclusions which cannot, regardless of their wording, actually be explained by the mere core content of the principles of effectiveness and equivalence, which, *prima facie*, only set as limits for national solution the prohibitions against practical impossibility or excessive difficulty of relying on EU law and against less favourable treatment of an EU law-based claim when compared to a claim based on domestic law.

However, *Unibet*, which was connected to freedom to provide services and which combined different effective judicial protection elements, the principle of effective judicial protection and the corresponding right occupying a central but possibly not exhaustive position, included noting that from the perspective of the twin principles

⁶⁷ Case C-406/08 *Uniplex* [2010] I-00817, see, in particular, para. 40–50, operative part. See also S. Prechal and R. Widdershoven, 4 *REALaw* 2, p. 39, 49 (2011): the authors note the case as a possible stringent application of effectiveness.

⁶⁸ Case C-406/08 *Uniplex*, see, para. 40–50, operative part.

⁶⁹ See, for example, para. 23 and 59.

⁷⁰ Case C-327/02 *Panayotova*, see para. 39 and the operative part. Emphasis added by this author. In addition to mentioning a procedural system, procedural autonomy reasoning is visible in para. 26–28. See also P. Craig and G. de Búrca, *EU Law Text, Cases and Materials*, p. 222–223 and 230–231 (2011).

⁷¹ See Case C-327/02 *Panayotova*, para. 26–27.

(and other EU law), national remedies appeared sufficiently effective and acceptable. The national system allowed opportunities to challenge the compatibility of national law with EU law even though a separate action was not available.⁷² Grant of interim relief until the compatibility of national law with EU law was solved and the criteria for granting interim relief to suspend the application of the questioned provisions were discussed in the light of the mixture of EU law requiring effective judicial protection. The CJEU emphasised that interim relief must be possible if it is necessary to secure full effectiveness of a later judgment that concerns the existence and protection of EU law rights⁷³ and that even though criteria for suspension of application of national provisions must be determined by the national system, the procedural autonomy twin principles (with their core content written out) must be observed.⁷⁴ Regardless of a significant amount of discussion on effective judicial protection and limits of procedural autonomy, the conclusions of the CJEU do not appear extreme or interventionist. It is, however, deducible that the CJEU could see a self-standing action necessary in other national legal circumstances.⁷⁵

Regarding *some other EU law matters* (even though division into central Internal Market or economic law and *other*, ‘*more peripheral EU law*’⁷⁶ is robust and not as informative or justified from the point of view of the whole of EU law as it might have been), cases can be pointed out where the ‘minimum contents’ of the principles of effectiveness and equivalence seem to prevail and leave space for manoeuvre by national systems. This is in line with some earlier suggestions by scholars on the CJEU’s possible lesser intervention. In, for example, *Fuß* (protection of employees) this is the case at least partially, as the CJEU focuses on the minimum meaning of the twin principles.⁷⁷

However, there are also cases of a ‘*more peripheral EU law*’ and *strong intervention* in national remedial and procedural matters. In the employment law-related *Impact*, the CJEU combined different judicial protection elements of EU law, but the role of full effect reasoning as well as the procedural autonomy principles (their core content written out) is significant. The requirements set for the national system concerned a specialised court’s jurisdiction to hear a directive-based claim in addition to claims relating to transposing national law if presenting the EU law based claim in an ordinary national court would entail *procedural disadvantages* ‘liable to render excessively difficult the exercise’ of EU rights.⁷⁸

⁷² See Case C-432/05 *Unibet*, para. 37–65.

⁷³ See *ibid.*, in particular, para. 77.

⁷⁴ See *ibid.*, in particular, para. 82–83.

⁷⁵ See also M. Klamert, *The Principle of Loyalty in EU Law*, p. 130; S. Prechal and R. Widdershoven, 4 REALaw 2, p. 41–42 (2011).

⁷⁶ Understood as law regarding issues with only indirect or minor links to economic integration or functioning of the Internal Market. As to problems of this kind of classification, see M. Dougan, *National Remedies Before the Court of Justice*, p. 83–84, 217–226, 386–390.

⁷⁷ Case C-429/09 *Fuß* [2010] ECR I-12167 see para. 62, 95. See, however, 92, 98.

⁷⁸ Case C-268/06 *Impact*, see para. 40–55. See also S. Prechal and R. Widdershoven, 4 REALaw 2, p. 39, 49 (2011): the authors note the case as a possible stringent application of effectiveness.

Pontin dealt with EU secondary law relating to equal treatment of men and women and prohibition against dismissal during pregnancy and maternity leave as well as restrictions on remedies available for dismissed women. The CJEU recalled the twin principles and noted as to their meaning, interestingly, that a limitation period ‘does not appear to meet that condition, but that is a matter for the referring court to determine’.⁷⁹ The judgment in *Transportes Urbanos* discussed the availability of Member State liability damages actions and applied the principle of equivalence (and not just gave guidance) as to evaluating the purpose and similarity of an EU law-based and a domestic claim, stating that EU law precludes a rule on exhaustion of remedies before an EU law Member State liability claim is possible if this is not the case with ‘domestic State liability’.⁸⁰

In the context of secondary environmental legislation, rather far-reaching demands as to providing judicial review and possibly disapplying national law were made in *Boxus*.⁸¹ As Van Cleynenbreugel emphasises, procedural autonomy reasoning did not, however, have a prominent role in the case.⁸² In the social policy case *Rosado Santana* there was at least detailed discussion on applying the twin principles, in particular, the principle of effectiveness.⁸³ In *Sopropé*, dealing with the principle of respect for the rights of the defence (and Community customs regarding products imported from third countries, for that matter), it seems that the CJEU was willing both to intervene and in a detailed way direct application of the principle of effectiveness.⁸⁴

In *Mangold*, reasoning similar to procedural autonomy reasoning plus referring to the obligation to ensure that EU rules take full effect, combined with the general principle of non-discrimination in respect of age, resulted in demands to set aside national

⁷⁹ Case C-63/08 *Pontin* [2009] ECR I-10467, see para. 59–69. The Court also mentioned that a rule which does not meet the requirements set by the twin principles would ‘not be considered to meet the requirement of effective judicial protection of an individual’s rights under Community law’ (para. 68).

⁸⁰ Case C-118/08 *Transportes Urbanos* [2010] ECR I-00635, see, in particular, para. 38–48. As to comments, see C. Plaza, ‘Member States Liability for Legislative Injustice, National Procedural Autonomy and the Principle of Equivalence: Going too far in *Transportes Urbanos*?’, 3 REALaw 2, p. 27–51 (2010) (the author, eg, contests the correctness of finding similarity). See also S. Prechal and R. Widdershoven, 4 REALaw 2, p. 39 and 49 (2011). The authors point out the case, as well as *Pontin*, as a possible stringent equivalence case.

⁸¹ Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus* [2011] ECR I-09711.

⁸² P. Van Cleynenbreugel, 5 REALaw 1, in particular, p. 98 (2012).

⁸³ Case C-177/10 *Rosado Santana* [2011] ECR I-07907, see para. 89–100.

⁸⁴ Case C-349/07 *Sopropé* [2008] ECR I-10369, see para. 43–54. See also S. Prechal, ‘Competence Creep and General Principles of Law’, 3 REALaw 1, p. 5–22, at 11–13 (2010). The author notes that dealing with general principles of EU law seems at points to be connected to strong demands for national systems. The author, who also discusses, among others, Case C-276/01 *Steffensen* [2003] ECR I-03735 (on evidence, fair hearing and foodstuffs, combining procedural autonomy reasoning with strong demands for observance of the right to a fair hearing and general principles of law, see para. 60–80), states that general principles may bring about additional requirements which narrow down the principle of procedural autonomy.

legislation.⁸⁵ In *Kücükdeveci*, the reasoning is practically entirely focused on the full effectiveness of EU law and national courts' (sincere cooperation-based) obligations⁸⁶ – without signs of procedural autonomy reasoning.

On the basis of this glance at potentially intriguing cases, a requirement that exceeds the core contents of the principles of effectiveness and equivalence seems to appear, even though sporadically, in the case law of the CJEU. Remarkably, the passages on requirements for national systems often suggest that tighter limits of acceptability of national law – or exact rules created by specifying interpretations of these tight limits – form procedural autonomy law or interpretations of the procedural autonomy principles. This continues to occur, moreover, in contemporary case law not studied above.⁸⁷

Nevertheless, listing the interesting aspects of a selection of cases is only a step towards discussion of 'adequate judicial protection' as an element and a potential extension of the traditional procedural autonomy principles. The applicability and significance of any of the procedural autonomy requirements is not extremely coherently illustrated or expressed by case law.⁸⁸ Furthermore, even though some connection may be proposed between the CJEU's focus on the full effect of law central to EU (economic) goals and 'adequate judicial protection', the listing as such is inconclusive. In addition to cases that emphasise full effectiveness of central Internal Market-related law, there are instances of strong intervention and additional requirements (within procedural autonomy reasoning) in the context of different legal fields or issues. Intervention in fundamental right-type matters and related remedies could well be one of the current tendencies, as well as emphasising the significance of EU law general principles.

In the following analysis (III.D), a different thematic approach, focusing on the *remedy of compensation*, is adopted as part of an attempt to observe the 'adequate judicial protection' requirement and its application. Also general, more analytic remarks (III.E–III.F) are presented on the basis of the case law highlights.

⁸⁵ Case C-144/04 *Mangold* [2005] ECR I-09981, see, in particular, para. 76–78. See also S. Prechal, 3 REALaw, 1, p. 19–22 (2010); C. Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value', 19 ELJ, 4, p. 457–487, at 476–483 (2013).

⁸⁶ Case C-555/07 *Kücükdeveci* [2010] ECR I-00365, para. 45–53. See also S. Prechal, 3 REALaw, 1, p. 17–19 (2010). On the links between the procedural autonomy principles, full effectiveness and the principle of sincere cooperation, see M. Klamert, *The Principle of Loyalty in EU Law*, p. 125–139; J. Temple Lang, 27 *Fordham International Law Journal*, p. 1905–1922, 1938 (2003–2004). See also M. Claes, *The National Courts' Mandate in the European Constitution*, p. 120–148 (Oxford: Oxford University Press, 2006).

⁸⁷ See remarks above in Sections III.B–III.C, and, for example, Case C-327/02 *Panayotova*, para. 26–27; See also Joined Cases C-295/04 to C-298/04 *Manfredi*, para. 95–100; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, para. 67, 82–90. As to other recent case law, see also, for example, C-565/11 *Irimie* [2013], electronic reports, para. 20–29; Case C-331/13 *Nicola* [2014] (not yet reported), para. 29–38.

⁸⁸ See also, for example, the discussion on competition law-related cases above. See also S. Prechal and R. Widdershoven, 4 REALaw 2, p. 32–33 with references (2011).

D. CLOSER LOOK AT THE EXTENT OF COMPENSATION AND THE REQUIREMENTS SET BY EU LAW

The first clear signs of the ‘adequate judicial protection’ requirement were, among other things, characterised by focus on sufficient compensation.⁸⁹ The *Marshall II* judgment coupled the requirement of adequacy to requiring full, comprehensive compensation.⁹⁰ *Marshall II* also included discussion on compensable harms and required an award of interest.⁹¹ Later, demands for full compensation or compensation for certain types of loss have several times been presented by the CJEU, most of all expressed as application of the principle of effectiveness. The relevant lines of reasoning have appeared both in earlier and later judgments, even though with varying directness, connected to the deterrent effects of damages liability.⁹²

In *Brasserie du Pêcheur*, the CJEU communicated a connection between the requirement of commensurate reparation and the prohibition against total exclusion of loss of profit from compensable harms and the procedural autonomy principles.⁹³ It was expressly noted that ‘a total exclusion of loss of profit would be such as to make *reparation* of damage *practically impossible*’.⁹⁴ Also a hint regarding the relevant matters involved in joined cases is made by noting that this is the case ‘(e)specially in the context of economic or commercial litigation’.⁹⁵ Effective protection of EU law rights is one of the background elements for detailed discussion on the extent of reparation.⁹⁶ *Palmisani*, *Bonifaci* and *Maso* all included references to adequate and commensurate reparation. The relationship between the two expressions remains obscure.⁹⁷

The extent of compensation and recoverable losses have remained central themes in CJEU interventions in national remedial matters. As suggested above (III.C), the remarkable nature of *Courage* case law is not only tied to the existence of private liability but to the extent and significance of liability. One evident background

⁸⁹ See, in particular, Case 14/83 *Von Colson*, para. 28.

⁹⁰ Case C-271/91 *Marshall II*, para. 26.

⁹¹ *Ibid.*, para. 30–32.

⁹² See also Sections III.B–III.C above.

⁹³ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, para. 67, 82–90.

⁹⁴ *Ibid.*, para 87. Emphasis added by this author.

⁹⁵ *Ibid.*, para 87. See similarly later Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, para. 91; Joined Cases C-295/04 to C-298/04 *Manfredi*, para. 96 (with references to earlier judgments).

⁹⁶ See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, para. 82.

⁹⁷ See Case C-261/95 *Palmisani* [1997] ECR I-04025, para. 26, 34; Joined Cases C-94/95 and C-95/95 *Bonifaci* [1997] ECR I-03969, para. 48, 53; Case C-373/95 *Maso* [1997] ECR I-04051, para 36, 41. M. Dougan, *National Remedies Before the Court of Justice*, p. 258–259, notes the ambiguity and suggests that commensurability (often expressed as commensurability ‘with the loss or damage sustained’) could refer to full compensation whereas adequacy would signify a possibility to restrict the extent of reparation. These issues are intertwined with conceptions on relevant damage and on valuing different interests. See also note 107 below.

premise for the CJEU's detailed requirements in this context is the establishment of primary EU law as a noteworthy regulator of horizontal relationships. Judgments discussing competition infringement-related damages have been explicit with the desired effect of damages liability as regards undertakings' compliance with EU competition law.⁹⁸

For instance, in *Manfredi* the principle of effectiveness is an express starting point for requirements relating to the types of recoverable losses and the extent of compensation.⁹⁹ There are, however, also matters the CJEU leaves to be governed by national solutions – this is illustrated, for example, by the treatment of exemplary or punitive damages in *Manfredi*. Also in this kind of context, general references are made to the principle of equivalence.¹⁰⁰

More recent Member State liability cases have also referred to *commensurate* reparation. *Fuß* even, to some extent, discusses the concept which nevertheless remains obscure. Determining the amount of reparation is to a great extent left for the national system under the twin principles.¹⁰¹ *Adequacy* of reparation has not been generally clarified by the CJEU.

Arranging details of the extent of liability is also at the core of *Kone* where the Advocate General noted, for example, that 'loss resulting from umbrella pricing is not loss the occurrence of which is always atypical or unforeseeable by the members of the cartel. It would be *incompatible with the practical effectiveness*' of the current Article 101 TFEU 'to preclude compensation for such loss from the outset'.¹⁰² The

⁹⁸ See also, however, Opinion of Advocate General Geelhoed in *Manfredi*, para. 69. Here, a view similar to demands for adequacy or commensurability in earlier judgments can be seen.

⁹⁹ Joined Cases C-295/04 to C-298/04 *Manfredi*, para. 95–100 (para. 95 stating 'it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss – but also for loss of profit – plus interest.').

¹⁰⁰ Joined Cases C-295/04 to C-298/04 *Manfredi*, para. 98–99. See also Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, para. 89–90. The relationship of the (procedural autonomy and twin principle-governed) concept of causality and the extent of reparation is, too, an issue. Here it cannot be explored fully, but one can ask whether leaving the causal connection to be determined in accordance with domestic criteria with plenty of space for manoeuvre undermines any statements on the extent of compensation. Also consider the significance of the Grand Chamber adopting the concept of *direct* causal link (used in some of the vertical liability cases) in the context of private competition liability in Case C-199/11 *Otis*, para. 65.

¹⁰¹ Case C-429/09 *Fuß*, para. 92–98 (with references to *Brasserie du Pêcheur* and the relationship of the twin principles and commensurability seeming unclear). Conclusions are: 'Consequently, – the reparation, – must be commensurate with the loss or damage sustained. In the absence of relevant EU law provisions, it is for the national law of the Member State concerned to determine, while ensuring observance of the principles of equivalence and effectiveness, first, whether reparation for the loss or damage suffered by a worker such as Mr Fuß in the main proceedings, as a result of the breach of a rule of EU law, should take the form of additional time off in lieu or financial compensation for the worker and, second, the rules concerning the method of calculation of that reparation'. See also, for example, Case C-470/03 *A.G.M.-COS.MET* [2007] ECR I-02749, para. 94 (no guidance as to determining commensurability and a reference to the twin principles).

¹⁰² See Opinion of Advocate General Kokott in Case C-557/12 *Kone*, para. 52. Emphasis added by this author. See also para. 90.

CJEU reasoned in a similar way.¹⁰³ In the Advocate General's reasoning, the procedural autonomy twin principles, especially effectiveness, seem central even though their detailed role and relationship to, for example 'full effectiveness' and 'practical effectiveness' are not clear.¹⁰⁴ In the ruling, the procedural autonomy *dictum* is used and effective application and full effect of competition law are referred to but the detailed interrelations of different requirements remain open.¹⁰⁵

Regardless of apparent ties to the core contents of the principles of effectiveness and equivalence, links between the principles and guidance by the CJEU as to requiring full compensation or compensation for certain types of damage are not self-evident. The detailed requirements presented do not very logically follow from the core contents of the principle of effectiveness.¹⁰⁶ Moreover, it can be noted that the ways in which pure economic loss should be treated according to the CJEU in the cases discussed may grant more and easier compensation than treatment according to purely domestic legal orders. Compensation other than 'full' could be completely in accordance with the core meaning of equivalence.¹⁰⁷

It is understandable that the explicit core contents of the principle of effectiveness require *some kind of reasonability as to recoverable losses* (for example, that national rules may not categorically result in finding that all the harms which relate to EU law infringements are other than recoverable) or even *regarding amount of compensation* (for example, that other than completely insignificant compensation is possible). From this area, however, there is still a distance to the detailed discussion the CJEU has presented.¹⁰⁸ Nevertheless, it is rather clear that the 'extended' interpretation of, in particular, the principle of effectiveness is also capable of getting established as a part of (apparent) detailed interpretation of the procedural autonomy *dictum*.

¹⁰³ See, in particular, para. 25–26, 33. Note similarities with *Donau Chemie*. As to reasoning in *Kone*, see also, for instance, N. Dunne, 51 CMLR 6, p. 1818–1823, 1825–1828 (2014).

¹⁰⁴ See, in particular, para. 22–52, 60–61, 74–75, 83, 90.

¹⁰⁵ See para. 25–26, 33–37. See also N. Dunne, 51 CMLR 6, p. 1818–1821, 1825–1826 (2014).

¹⁰⁶ See also K. Havu 150 JFT 1–2, p. 59–63 (2014); K. Havu, *Oikeus kilpailuoikeudelliseen vahingonkorvaukseen EU:n ja Suomen oikeudessa*, p. 252–257.

¹⁰⁷ Varying perceptions of seriousness of pure economic loss and perceptions on what constitutes relevant damage may in any case give rise to versatile interpretation of the CJEU's statements. By using the procedural autonomy *dictum*, judgments also refer back to national systems (for example, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, para. 82–89; Case C-429/09 *Fuß*, in particular, para. 92–95), which is contra-intuitive even more generally: 'make sure compensation is commensurate but you may set the criteria for commensurability rather freely'. See also M. Dougan, *National Remedies Before the Court of Justice*, p. 258–260; K. Havu, 'Quasi-coherence by Harmonisation of EU Competition Law-related Damages Actions?', in P. Letto-Vanamo and J. Smits (eds.), *Coherence and Fragmentation in European Private Law*, p. 25–42, at p. 40 (Munich: Sellier, 2012).

¹⁰⁸ The early statements in *Von Colson* were, however, closer to the ideas presented now: see Case 14/83 *Von Colson*, para. 28.

E. REMARKS ON THE RELEVANCE OF THE ‘ADEQUATE JUDICIAL PROTECTION’ REQUIREMENT

Many of the explicit ‘adequate judicial protection’ cases relate to compensation for EU law infringements. Nevertheless similar reasoning, that is often strongly rooted in the full effectiveness of EU law and that results in new and partially remarkable restrictions on procedural autonomy, is also found in other cases. Studying the strong demands imposing element of procedural autonomy law should not thus be restricted to explicit comments on adequacy of commensurability. It appears appropriate also to consider (other) conclusions seemingly made on the basis of the principles of effectiveness and equivalence but which are not logical deductions from the wordings of those principles as instances of interesting significant demands.

Moreover, the meaning of the twin principles is sometimes actually undermined by detailed discussion or application by the CJEU – this is also a way to extend the principles and allow strict interventions.¹⁰⁹ In some of the cases, it is generally obscure what causes the detailed or significant requirements and whether they form procedural autonomy law or something else.¹¹⁰ It is evident that far-reaching requirements may also concern matters that are procedural or relating to the arrangement of the national procedure.¹¹¹ The relevance of the ‘adequate judicial protection’ requirement – or any extra requirements – in new cases before national courts is ambiguous. Ambiguity appears to relate both to the issue whether tighter (actually twin principle-exceeding) limits of acceptability of national law *apply* and to the issue of *what exactly the tighter limits are*.¹¹² Even the language referring to adequacy or commensurability is not very exact.

The way the CJEU, when imposing tighter limits on the acceptability of national law, may ‘extend’ or interpret normal procedural autonomy principles broadening their meaning is prone to create lack of clarity. The pointillist and almost misleading way in which different requirements for the national remedial and procedural system appear in case law inevitably results in a situation where it is difficult for national

¹⁰⁹ See, for example, Case C-63/08 *Pontin*; Case C-118/08 *Transportes Urbanos*; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (para. 82–90, in particular, 87); Joined Cases C-295/04 to C-298/04 *Manfredi* (para. 95) and discussion in Sections III.C and III.D.

¹¹⁰ In addition to Sections III.C and III.D, see Prechal’s remarks discussed in note 84 above. In comparison, Case C-63/08 *Pontin* seems to use more general ‘requirement of effective judicial protection’ of EU rights as a final punch-line, after procedural autonomy reasoning which already suggests that national law is unacceptable (see para. 59, 67–68).

¹¹¹ Of the cases mentioned in Section III.C, see for example, Case C-268/06 *Impact*, Case C-439/08 *VEBIC* and Case C-327/02 *Panayotova*. See also Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft* [2010] ECR I-13849. The interventionism in this area has been recognised by, for example, P. Van Cleynenbreugel, ‘Judge-made standards of national procedure in the post-Lisbon constitutional framework’, 37 *European Law Review* 1, p. 90–100, see, in particular, p. 92–94 (2012).

¹¹² See also P. Van Cleynenbreugel, 18 *MJ* 4, p. 538–539 (2011), who notes, justifiably, that the border between procedural autonomy law and ‘*Simmenthal* reasoning’ becomes increasingly blurry. As to the more general centrality of the full effect of EU law and the questionable existence of any procedural autonomy, see R. Barents, 51 *CMLR*, p. 1456 (2014).

courts to analyse their obligations, the correct level of adaptation of remedial and procedural details in order to guarantee effectiveness of EU law, and decide whether it is *enough*, for instance, that national law and its application does not render relying on EU law practically impossible or excessively difficult.¹¹³

The existing case law interpreting in particular the principle of effectiveness – be it the core contents or the extended version of the principle – and creating more concrete limits or rules is *prima facie* helpful in situations very similar to those already decided. However, this is also uncertain as it is possible that, for example, the existing case was a situation of ‘normal application of the procedural autonomy twin principles’ and the case before a national court would be a situation where tighter limits (‘adequate judicial protection’) on national law should apply.

Even though conclusions as regards possible variation of the requirements in *different fields of EU law* or recognizing fields with particularly strong requirements cannot be exhaustive on the basis of this study, and perhaps not in the current phase of law in any case, it is worth noting that the possibly highly instrumental element of ‘adequate judicial protection’ could play a crucial part in, for example, the context of private enforcement cases under EU competition law.¹¹⁴ Competition law enforcement could also more broadly be a matter where remedial and procedural requirements are particularly high. Paragraph 27 of *Donau Chemie* could actually be very close to an indirect explanation of what the twin principle-exceeding, seemingly procedural autonomy law demands are about. It also closes the circle back to much earlier remarks on the CJEU’s possible particular interests in commenting on remedies and procedure in areas that are essential for the Internal Market.¹¹⁵ One should, in any event, bear in mind that explicit links to the competition provisions do not exclude the possibility of developing similar reasoning in the context of free movement law – or any other EU law.¹¹⁶

In several fields of substantive law, the extent of damages liability and ideas of deterrence (both in very early and very recent cases) have been instances of not logical but apparently procedural autonomy twin principles-derived requirements, as well as other detailed requirements. However, not all matters relating to extent and deterrence are encompassed,¹¹⁷ which results in insecurity as to possible conclusions from the case law. One obvious deduction is, however, that (and regardless of how the

¹¹³ As to the ‘mildness’ of the *Rewe*-test (or its core contents) and the unpredictability of employing it, see also S. Prechal and R. Widdershoven, 4 REALaw 2, p. 38–41 (2011); P. Van Cleynenbreugel, 5 REALaw 1, p. 88–90 (2012); F. Della Negra, 52 CMLR, p. 1020–1024 (2015).

¹¹⁴ See Section III.D. See also earlier remarks K. Havu 150 JFT 1–2, p. 58–63 (2014); G. Cumming et al., *Civil Procedure Used for Enforcement of EC Competition Law by the English, French and German Civil Courts*, p. 280.

¹¹⁵ See C-536/11 *Donau Chemie*, para. 27. As to remarks by scholars, see, for example, notes 13–14 above.

¹¹⁶ See also, in the context of justifying horizontal liability, K. Havu, 18 ELJ 3, p. 424–426 (2012).

¹¹⁷ See Sections III.B and III.D as well as, in particular, the treatment of exemplary or punitive damages in Joined Cases C-295/04 to C-298/04 *Manfredi*, para. 98–99.

CJEU's remarks on compensable losses and sufficient compensation are introduced by the Court itself or described by scholars) mere interpretation of the core contents of the twin principles without paying attention to cases with detailed guidance may result in a judgment which does not take EU law into account with sufficient intensity.

F. REMARKS ON THE MEANING OF 'ADEQUATE JUDICIAL PROTECTION' OR EXTRA REQUIREMENTS AND OUTLOOK

No general contents or meaning for the 'adequate judicial protection' requirement or element may be extrapolated on the basis of the cases reviewed. Furthermore, the tentatively recognised murkiness of focus, visible as vaguely highlighting the position of the individual while presenting arguments from the standpoint of the full effect of EU law, remains even in closer examination. The common denominator for cases where there are signs of exceeding the requirements set by the principles of effectiveness and equivalence in the context of procedural autonomy reasoning is *the exceeding itself*, when compared to the core contents of the twin principles, but not, for instance, certain detailed requirements or a certain clear level of requirements. The CJEU's way of using similar basic explanations as starting points for making interventions of different 'intensity' makes predicting future developments and acceptability of national solutions quite challenging.

In more detail, it may be submitted that lack of clarity in terms of the meaning of 'adequate judicial protection' is two-fold: first, scarce and ambiguous instances of application in the case law do not give rise to simple conclusions, and, secondly, the content or meaning of the requirement is casuistic by nature. Guaranteeing *effective, sufficient* application of EU law, and for example *commensurable* redress as an element of such application, in a specific legal and factual context, also underpins the difference of the requirement when compared to the 'traditional' procedural autonomy twin principles and their explicit, negative and as such not especially flexible explanations.

Full effectiveness, the principle of sincere cooperation and thus Member State obligations to contribute to achieving the goals of EU law are in any event relevant perspectives to the meaning of the 'adequate judicial protection' requirement (or any extra requirements). They are important in addition to the potential, more particular or situation-specific guidance relevant for a specific case. Especially in the context of the central Internal Market or economic law, the connection to effective application and full effect, and to duties under 4(3) TEU, is already central on the basis of the cases reviewed. The connection signifies that even though no clear contents for so-called 'adequate judicial protection' could be determined, it is to some extent possible to understand and predict how the possibly casuistic meaning of the requirement crystallizes.

Nevertheless, even recognising the effective application of substantive EU law as an indicator of acceptable ways to decide a case before a national court, *contributing to the full effect of EU law* and *the decision which most contributes* are still, depending on the case involved, potentially demands of different intensity, the last mentioned being the one that leaves the least space for national manoeuvre.¹¹⁸ Absence of clarity as to evaluation of acceptability of national remedial and procedural law is accentuated by the fact that the CJEU reviews a minority of potentially relevant cases – only those where preliminary ruling requests are submitted.

The express tying of procedural autonomy reasoning to effective application of a substantive field of law, as was done, for instance, in *Donau Chemie*,¹¹⁹ serves as an example of the direction the reasoning by the CJEU could take in future judgments. This direction could also include elaborating on the relationship between classic procedural autonomy *dicta* and remarks in their vicinity. Also matters relating to deductions on the basis of the classic *dictum* and core contents of the twin principles and conclusions based on other demands for the national system could be illuminated.¹²⁰

Where an express connection is made to a field of law and effective application, the specific substance of rules may allow more detailed analysis of the necessary measures in a case before a national court. Obligation to contribute to achieving the goals of EU law then underpins the possible options – even though it may still remain open whether only the treatment which most contributes to achieving the goals is acceptable. In this context, the above mentioned risk of misguided ‘over-compliance’ is also relevant. Requests for preliminary rulings should thus be readily made by national courts.¹²¹

¹¹⁸ The ‘required level of full effectiveness’ is ambiguous, for instance, in Case C-536/11 *Donau Chemie* (para. 27, 49) and in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (para. 82, 90). However, ‘the *Simmenthal* line’ seems to require ‘the fullest effect’: see Case 106/77 *Simmenthal* [1978] ECR 00629 and, for example, Case C-409/06 *Winner Wetten*.

¹¹⁹ Case C-536/11 *Donau Chemie*, para. 27.

¹²⁰ Compare to Case C-536/11 *Donau Chemie*, para. 27–49 where the principle of effectiveness is apparently central but where the issue of ‘which effectiveness’ (see R. Nazzini, ‘Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law’, in C. Barnard and O. Odudu, (eds.), *The Outer Limits of European Union Law*, p. 401–435 (Oxford and Portland: Hart Publishing, 2009)) may also be relevant. From the perspective of procedural autonomy effectiveness, the Court’s analysis may be implicitly tilted towards requiring that the national system should allow *easily obtaining compensation*, which is different from having a possibility to present claims on the basis of EU law. Thus the CJEU’s approach, especially if elaborated further, at some point potentially departs from the core of procedural autonomy effectiveness. Note also recent remarks on possible ‘social-oriented’ effectiveness and on effectiveness in consumer cases: F. Della Negra, 52 CMLR, p. 1020–1024 (2015).

¹²¹ However, ambiguities relating to EU law on judicial protection in national courts also have the potential effect that a national court does not recognize that the state of EU law requires clarification.

IV. CONCLUDING REMARKS

This article has discussed the nuances of the limits of acceptability for national remedial and procedural solutions in cases with a EU law aspect. The contribution elaborated on the ‘adequate judicial protection’ requirement as an expression and potential extension of the principles of effectiveness and equivalence. Analysis illustrated how CJEU case law on treatment of cases before national courts may be enigmatic and even illogical. This complicates the task of correctly applying EU law. Furthermore, parties to disputes face significant uncertainty as to the likely treatment of their case. As an attempt to improve the situation, some precise suggestions may be presented as a continuation to remarks in previous Sections.

In addition to the need for clarification of the whole of EU law on judicial protection in the Member States, the narrower field of procedural autonomy law would benefit from more detailed reasoning by the CJEU. If the twin principles are expanding in meaning, creating tighter limits on national systems, the apparent focus on their ‘minimum contents wordings’ should be re-thought. Additionally, when presenting requirements that are necessary in order to guarantee effective application of the substantive law in question, these requirements should not be apparently derived from the principles of effectiveness and equivalence when they actually form demands that may be described as additional to the established twin principles. When requirements are characteristic of a particular field or matter of EU law, stating this clearly, as has at points happened, is in order. Maybe relying on rough concepts – such as the ‘adequate judicial protection’ requirement – that try to collect the manifold expansions of demands for national systems can be made unnecessary.